BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SUSAN MAYES	)	
Claimant	)	
V.	)	
	)	
RENO COUNTY	)	
Respondent	)	Docket No. 1,065,442
AND	)	
	)	
KANSAS WORKERS RISK COOP FOR COUNTIES	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the October 10, 2014, Award Nunc Pro Tunc entered by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on February 10, 2015.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award Nunc Pro Tunc. At oral argument, the parties clarified their joint stipulation regarding temporary disability benefits filed on February 18, 2014, by agreeing that if claimant's accident and injury are found compensable, claimant is entitled to seven weeks of temporary total disability payments of $570 per week commencing April 23, 2013, or $3,990, followed by two weeks of temporary partial disability payments at the rate of $432.60 per week, or $865.20. The parties also stipulated that if the Board finds claimant's accident arose out of and in the course of her employment, claimant sustained a 17% impairment to the right lower extremity at the level of the knee.

ISSUES

ALJ Klein found:

> By stipulation the parties have agreed that the accident occurred on the premises of the respondent and is under their exclusive control. Therefore, even though the claimant was intending to leave the premises, the statute informs us that she shall not be construed as having left her duties. Her injury therefore, arose out of and in the course of her employment. The respondent would have the court parse or separate the coming and going rule from the requirement that an injury arise out of and in the course of claimant's employment. To do so would stand in direct conflict with the clear meaning of the statute which directs that an employee will not be construed as having left her duties while she is still on the premises of the employer. The parties did not address the phrase "the proximate cause of which is not the employer[']s negligence". If the court were required to make a ruling on the matter, the court would find that the respondent had a duty to clear the walkways of ice and snow that were under their exclusive control.[1]

The ALJ awarded claimant temporary total disability benefits and permanent partial disability benefits based upon a 17% functional impairment. Although claimant sustained a knee injury, the permanent partial disability benefits were awarded for a lower leg injury rather than a leg injury.

Respondent maintains that at the time of her accident and injury, claimant was on a purely personal errand that had no causal connection to her duties, obligations and incidents of employment for respondent. Respondent asserts claimant was not in the furtherance of service to respondent, and her leaving for personal reasons unrelated to her employment was a deviation from employment such that her accident and injury must be found non-compensable.

Claimant contends that under the premises exception in K.S.A. 2012 Supp. 44-508(f)(3)(B), her injury arose out of and in the course of employment because her injury occurred on respondent's premises. She maintains there is a causal connection between her accident and the nature, conditions, obligations and incidents of her employment.

The sole issue is: did claimant's accident arise out of and in the course of her employment?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

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[1] ALJ Award Nunc Pro Tunc at 3.

Claimant has been an employee of respondent for 25 years. She is a juvenile intake and assessment officer and her shift is from 7 a.m. to 3 p.m. She testified that April 23, 2013, the day of her accident, was a cold, windy day, and it had been sleeting and raining. During her shift, claimant gets a 30-minute break and would take her break when it was convenient. She indicated she took her break around 9 a.m. on April 23. She testified she took her break early because she had been fasting and was going to give blood to have her A1c level checked. Claimant indicated that her supervisor knew she was taking her break early. Claimant testified she was on her break, had exited the building using the front door and was walking on the sidewalk to go to the parking lot when she slipped on a grate covered with ice. She fell and broke her right kneecap.

Claimant indicated that when she slipped on the icy grate, she was on respondent's property. The parking lot where her automobile was parked is owned by respondent and the public can park there. According to claimant, she was not required to clock out for her 30-minute break and her break is included in her eight-hour shift. She acknowledged that when she took her break on April 23, 2013, she was on a personal errand and not performing her normal job duties. Claimant testified there were several entrances, but the other entrances are key-locked entrances. She indicated the only available route between her office and the parking lot was through the entrance she took on April 23, 2013.

The only medical record placed into evidence was the November 8, 2013, report of Dr. C. Reiff Brown, who evaluated claimant at the request of her attorney. The report was stipulated into evidence by the parties. The doctor indicated claimant sustained a fractured patella of the left[2] knee that was surgically repaired. Using the *Guides*,[3] Dr. Brown assigned claimant a 17% lower extremity permanent functional impairment.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[4] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[5]

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[2] At oral argument, the parties stipulated this was in error and claimant sustained a fractured right knee patella and a 17% permanent functional impairment of the right lower extremity.

[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[4] K.S.A. 2012 Supp. 44-501b(c).

[5] K.S.A. 2012 Supp. 44-508(h).

K.S.A. 2012 Supp. 44-551(i)(1) states, in part:

> [T]he board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings.

K.S.A. 2012 Supp. 44-555c(a) states, in part:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

Board review of a judge's order is de novo on the record.[6] The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.[7] The Board, on de novo review, makes its own factual findings.[8]

K.S.A. 2012 Supp. 44-508(f)(2)(B), in part, states:

> An injury by accident shall be deemed to arise out of employment only if:
>
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and . . . .

K.S.A. 2012 Supp. 44-508(f)(3)(B) states:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the

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[6] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[7] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[8] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

> way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

Respondent does not dispute and the Board finds that claimant was injured on respondent's premises. Therefore, the premises exception to the going and coming rule applies and claimant is not automatically precluded from receiving workers compensation benefits. However, as stated by the Kansas Court of Appeals in *Bach*,[9]

> But this does not end the analysis. K.S.A. 2008 Supp. 44-501(a) imposes liability on the employer for workers compensation benefits for an employee's accidental injuries "arising out of and in the course of employment." The arising out of and in the course of employment language would be mere surplusage if the rule were that an employer is automatically liable for benefits for any injury suffered by an employee on the employer's premises. If that were the rule, our appellate courts and the Board have wasted a lot of ink and strained a lot of eyes examining this issue over the decades. We still have to examine whether Bach has demonstrated that her injury arose out of and in the course of her employment.

Respondent asserts that because claimant was on break and engaged in a personal errand, her injury is not compensable. Respondent argues that K.S.A. 2012 Supp. 44-508(f)(2)(B) provides that in order for an accident to be deemed arising out of employment, there must be a causal connection between the conditions under which the work is required to be performed and the resulting accident. In its submission letter to the ALJ, respondent cited Board decisions in *Johnson*[10] and *Sumner*.[11]

In *Johnson*, Ms. Johnson clocked out at the end of her shift. After doing so, she proceeded to the front of respondent's store, when she slipped, lost her balance on a bracket and fell. Ms. Johnson conceded she had briefly deviated from the act of leaving respondent's premises when her accident occurred. The Board held:

> The Board agrees with claimant's analysis. K.S.A. 2005 Supp. 44-508(f) codifies the Kansas "going and coming" rule. In essence, that statute generally provides that employees shall not be considered as having left their duties when the worker remains on the employer's premises. That general rule, however, does not automatically entitle employees to workers compensation benefits for all accidents that occur on an employer's premises as the accident must still somehow relate to the employment. In other words, the accident must arise out of and occur in the

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[9] *Bach v. National Beef Packing Co.*, No. 107,681, 2012 WL 6734659 (Kansas Court of Appeals unpublished opinion filed Dec. 21, 2012), *rev. denied* 297 Kan. ___ (2013).

[10] *Johnson v. Wal-Mart*, No. 1,027,707, 2006 WL 2328115 (Kan. WCAB July 2006).

[11] *Sumner v. Meier's Ready Mix, Inc.*, No. 1,008,450, 2004 WL 2522353 (Kan. WCAB Oct. 28, 2004), *aff'd*, *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 144 P.3d 668 (Oct. 27, 2006).

> course of employment[.] [Footnote citing K.S.A. 2005 Supp. 44-501.] And each determination must be made on a case-by-case basis. In short, the outcome is profoundly fact-driven.
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> Claimant fell near the checkout stands near the front of the store. She had not abandoned her intent to depart respondent's premises. The Board concludes claimant's brief deviation from departing respondent's premises was so insignificant in time and degree that claimant should not be denied compensation.[12]

In *Sumner*,[13] the Board denied compensation when Mr. Sumner was killed in a motor vehicle accident. Mr. Sumner was killed when he deviated from his normal route as a truck driver for Meier's Ready Mix to tend to a personal emergency at home. The Board held Mr. Sumner's death occurred during a substantial deviation from the employer's business purpose and, therefore, did not arise out of and in the course of his employment.

At oral argument, respondent argued *Teigen*[14] supports a finding that claimant's accident did not arise out of and in the course of her employment. On the day of his accident, Mr. Teigen arrived at work approximately a half hour before his shift was to begin. He was wearing a sweater that was too short. He sought permission to go to the Topeka Rescue Mission voucher store and obtain a T-shirt to wear with the sweater. This was allowed, and Mr. Teigen subsequently injured his shoulder in a fall at the voucher store.

Mr. Teigen argued his accidental injury arose out of and in the course of his employment because he was on Topeka Rescue Mission's premises and because the purpose of his trip or errand was for his and Topeka Rescue Mission's mutual benefit. Mr. Teigen's purpose in going to the voucher store was to make himself more presentable by obtaining a shirt more appropriate for work. Furthermore, by going to the voucher store instead of going home to obtain a shirt, Mr. Teigen would avoid being late for the start of his work shift.

Topeka Rescue Mission contended the premises exception to the going and coming rule was inapplicable because Mr. Teigen was not on his way to work. Instead, he had arrived for work early and was on a personal errand. Topeka Rescue Mission asserted Mr. Teigen's accident did not arise out of his employment because the purpose of his trip was personal and not a part of his employment. His accident did not occur in the course of his employment because his work shift had not started and he was not being paid when his accident occurred.

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[12] *Johnson*, *supra*.

[13] *Sumner*, *supra*.

[14] *Teigen v. Topeka Rescue Mission*, No. 251,237, 2002 WL 1491825 (Kan. WCAB June 12, 2002).

The Board denied Mr. Teigen's claim, stating:

> In this case, there is no assertion that travel was intrinsic to claimant's job. Furthermore, Mr. Teigen's situation would not be analogous to the special errand exception or the exception where the employees are paid for their travel time or expenses. Claimant was neither instructed to change his clothes nor was he being paid at the time of his accident. The facts in this case are likewise not analogous to the dual purpose doctrine which is predicated on the trip combining both personal and business purposes. The question in this case is not which of these two purposes was claimant engaged in when he was injured, but instead whether obtaining a shirt to wear at work was a business or a personal errand. The Board finds that the purpose of claimant's trip to the voucher store at the time of accident was personal. [Footnote citing *See Squires v. Emporia State University*, 23 Kan. App. 2d 325, 929 P.2d 814, *rev. denied* 262 Kan. 963 (1997); *Lawson v. City of Kansas City*, 22 Kan. App. 2d 507, 918 P.2d 653 (1996).] Therefore, his injury did not arise out of and in the course of his employment with respondent.

Claimant argues she is entitled to compensation because she was injured on respondent's premises and had not clocked out. She contends that under K.S.A. 2012 Supp. 44-508(f)(3)(B), she was not construed to have left her employment. Claimant cites the Board's decision in *Moran*.[15] Ms. Moran was injured when on her way into work at a Dillon Companies distribution center, she slipped and fell on snow and ice in the distribution center's parking lot. A Board Member found Ms. Moran's claim was not barred by the going and coming rule because the premises exception to the going and coming rule, embodied in K.S.A. 2012 Supp. 44-508(f)(3)(B), was applicable.

Claimant argues there was a causal connection between her job duties and her accident because she was required to enter and exit the building where she worked and was on a paid break. Claimant urges the Board to find that any worker injured on his or her employer's premises shall be construed to be engaged in employment duties.

The facts of the current case are distinguishable from those cases cited by the parties. Unlike *Sumner*, claimant was injured on respondent's premises. In *Johnson*, *Moran* and *Teigen*, the workers were injured before or after their shifts and were not injured on their way to or from a break. None of the workers in those cases were being paid at the time of their respective accidents.

The Board found the following cases compensable when the worker was injured during a break while on the employer's premises:

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[15] *Moran v. Arnold & Assoc. of Wichita and Dillon Companies, Inc.*, No. 1,064,968, 2013 WL 5521852 (Kan. WCAB Sept. 10, 2013).

- The Board Member deciding *Williams*[16] found Ms. Williams' accident arose out of and in the course of her employment when she was injured while walking to a designated smoking area next to her employer's building during a 30-minute, off-the-clock lunch break.

- The injured worker in *Kanode*[17] was injured during his lunch break on the way to the employer's parking garage when he decided to smoke a cigarette. He smoked a cigarette and resumed his trip to the parking garage, when the sun got in his eyes, he fell down steps and sustained injuries. The Board held travel to and from lunch, while on the employer's premises, was in the course of employment.

- In *Kellogg*,[18] the claim was found compensable when during an on-the-clock break Ms. Kellogg fell in her employer's restroom and was injured.

- The injured worker in *Burghart*[19] was on his authorized 20-minute break and was walking across the first floor lobby of the employer's building when he slipped and fell on a wet floor. Mr. Burghart was going to meet his wife to sign personal banking documents at the time of the accident. The Board Member found Mr. Burghart's personal errand was not so unusual or unreasonable that his actions took him outside the incidents of his employment.

- In *Free*,[20] the worker, while on break, was injured while walking on the sidewalk around her employer's building.

- In *Roath*,[21] during her break, Ms. Roath went to retrieve her purse from her car, which was on her employer's premises. As she was returning, she slipped on some ice, fell and sustained injuries. The Board held, "As breaks are a routine part of employment that benefit both the employer and the employee, accidents that occur during a routine break are considered to be compensable."

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[16] *Williams v. Allied Staffing*, No. 1,058,426, 2012 WL 1142973 (Kan. WCAB March 28, 2012).

[17] *Kanode v. Sprint Corporation*, No. 1,042,744, 2011 WL 4011668 (Kan. WCAB Aug. 17, 2011).

[18] *Kellogg v. AT&T*, No. 1,055,624, 2014 WL 4976738 (Kan. WCAB Sept. 16, 2014).

[19] *Burghart v. Key Staffing*, No. 1,053,105, 2011 WL 2185278 (Kan. WCAB May 25, 2011).

[20] *Free v. City of Emporia*, No. 250,401, 2000 WL 372281 (Kan. WCAB Mar. 15, 2000).

[21] *Roath v. ASR International Corporation*, No. 1,032,944, 2008 WL 651675 (Kan. WCAB Feb. 18, 2008).

In the present case, claimant was on break, clocked in and was leaving with the knowledge of her supervisor. The Board finds claimant's personal errand was not so unusual or unreasonable that her actions took her outside the incidents of her employment.

CONCLUSION

Claimant proved her accident arose out of and in the course of her employment.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[22] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the October 10, 2014, Award Nunc Pro Tunc entered by ALJ Klein as follows:

Claimant is granted compensation from respondent and its insurance carrier for an April 23, 2013, accident and resulting disability. Claimant is entitled to receive 7 weeks of temporary total disability benefits at $570 per week, or $3,990, followed by $865.20 in temporary partial disability benefits, followed by 32.55 weeks of permanent partial disability benefits at $570 per week, or $18,553.50, for a 17% permanent functional impairment to her right leg, for a total award of $23,408.70, which is all due and owing less any amounts previously paid.

The Board rescinds the ALJ's order approving claimant's attorney fee arrangement as the file contains no attorney fee contract. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

The Board adopts the remaining orders set forth in the Award Nunc Pro Tunc to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

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[22] K.S.A. 2013 Supp. 44-555c(j).

Dated this ____ day of March, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Thomas Klein, Administrative Law Judge